

Before the
Federal Communications Commission
Washington, D.C. 20554

2002 MAY 23 A 11: 17

In the Matter of)

Communique Telecommunications, Inc.)
d/b/a Logically and InterContinental Telephone Corp.)

CC Docket No. 99-290

Petition for Reconsideration of the Commission's Order on)
National Exchange Carrier Association, Inc.,)
Tariff F.C.C. No. 5, Governing Universal Service Fund)
and Lifeline Assistance Charges)

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 2001

Released: May 21, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny a joint petition for reconsideration ("Joint Petition") filed by InterContinental Telephone Corporation (ICTC) and Communique Telecommunications, Inc., d/b/a Logically (Communique) ("petitioners," collectively). ICTC and Communique seek reconsideration of our August 1999 Order denying ICTC's Petition for Declaratory Ruling and upholding the authority of the National Exchange Carrier Association (NECA)¹ to bill and collect the Universal Service Fund (USF) and Lifeline Assistance (LA) charges contained in NECA's Tariff F.C.C. No. 5, as agent for its member LECs.² Because we find that the Joint Petition raises no new argument, we deny this request.

¹ NECA, an association comprised of all incumbent local exchange carriers (LECs), prepares and files access charge tariffs on behalf of those LECs that do not file separate tariffs or concur in a joint access tariff of another LEC. 47 C.F.R. § 69.601 *et seq.* During the period of time relevant to the claims at issue, NECA also administered the USF and LA programs on behalf of the LECs, including those that do not participate in NECA's tariff. 47 C.F.R. §§ 69.116, 69.117.

² Communique Telecommunications, Inc. d/b/a/ Logically Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau, InterContinental Telephone Corp Petition for Declaratory Ruling on National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, 14 FCC Rcd 13635 (1999) (*ICTC Order*). The *ICTC Order* also dismissed, as late-filed, an application for review filed by Communique (*Communique Application for Review*) of a related order issued by the Common Carrier Bureau. See Communique Telecommunications, Inc. d/b/a/ Logically Petition for Declaratory Ruling Regarding the Effectiveness of Tariff Rates and Regulations Governing Lifeline Assistance and Universal Service Fund Charges, Declaratory Ruling and Order, 10 FCC Rcd 10399 (Com. Car. Bur. 1995) (*Bureau Order*).

II. DISCUSSION

2. From July 1992 to January 1995, the time relevant to the claims at issue, for those LECs choosing to participate, NECA filed an access charge tariff that included the USF and LA charges.³ The access tariff filed by NECA stated that the participating LECs issued the tariff and included various enforcement ("self-help") provisions that could be implemented by the LECs upon nonpayment of USF and LA charges by an interexchange carrier (IXC).⁴ Under the NECA tariff, and the Commission's rules at that time,⁵ IXCs that used local exchange switching facilities for interstate or foreign telecommunications services were to be assessed separate charges for the USF and LA programs if they had .05 percent or more of the total nationwide subscriber lines⁶ that were presubscribed to an interexchange carrier for "1+" service.

3. As in their previous petitions for declaratory ruling, the core of petitioners' current argument is that NECA, as a non-common carrier, is not permitted to file tariffs; that any tariffs filed by NECA are improper; and that any attempts to bill and collect under such tariffs are therefore invalid.⁷ In the *ICTC Order*, however, we specifically addressed this issue and held that "as expressly authorized by Section 69.601(a) of the Commission's rules, and Sections 4(i) of the Communications Act, NECA is operating as [the member LECs'] agent."⁸ As an operating agent, NECA files the tariffs for its member LECs and bills and collects on behalf of its principal, the member LECs. The tariff binds the agent's discretion in accordance with the will of the principal.

4. Petitioners further argue that the Commission's comparison of the member LECs to connecting carriers who do not file tariffs and who instead use another carrier as their agent to file tariffs is not compelling for two reasons. First, petitioners allege that, unlike the connecting carrier situation where the agent is another common carrier, NECA is a non-carrier. Second, petitioners challenge this comparison by asserting that connecting carriers are not liable for damages caused by their agent under the Act.⁹

³ See *ICTC Order*, 14 FCC Rcd at 13636-39 (providing background on *inter alia* the USF and LA programs.)

⁴ See NECA Tariff F.C.C. No. 5, Original Title Page 1 and Section 2.1.8(F).

⁵ 47 C.F.R. § 69.116(a) as effective August 1, 1988 through December 1, 1997.

⁶ See Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, Memorandum Opinion and Order, CC Docket Nos. 78-72 and 80-286, 4 FCC Rcd 6134 (1989) (*USF/LA Order*), petition for review denied, *ALC Communications Corp. v. FCC*, 925 F.2d 487 (D.C. Cir. 1991) (*unpublished disposition*); 1989 Annual Access Tariff Filings Petitions for Waiver and Petition for Reconsideration, Memorandum Opinion and Order, 4 FCC Rcd 413 (Com. Car. Bur. 1988).

⁷ Joint Petition at 8-11.

⁸ *ICTC Order*, 14 FCC Rcd at 13645 citing 47 C.F.R. § 69.601(a).

⁹ Joint Reply at 4 citing *Comtronics v. Puerto Rico Telephone Co.*, 553 F.2d 701(1st Cir. 1977)(finding

These observations provide no basis for changing our rulings with respect to NECA's status as agent of its member LECs. Here, unlike the case of connecting carriers, Congress has not immunized the member LECs from liabilities due to the actions of their agent, NECA. Accordingly, petitioners have a recourse for any actions taken by NECA – they may file a complaint with the Commission against the principals, the member LECs, for any actions taken by NECA.

5. Petitioners argue that the Commission should reconsider its decision not to rule on the lawfulness of the self-help provisions and contend that the issue was ripe for consideration because NECA had a collection action that was pending at the time of the *ICTC Order*. The record demonstrates, however, that NECA filed the collection action in question on behalf of its member LECs after both petitioners filed their claims with the Commission. The court dismissed NECA's cases against the petitioners and referred them to the Commission for resolution of the underlying issue of whether NECA could tariff, bill, and collect USF and LA charges for its member LECs.¹⁰ Thus, there are no current collection actions. We affirm our conclusions in the *Commission Order* regarding this issue and deny the petitioners' request for reconsideration.

6. Similarly, we reject ICTC's claim that NECA has discriminated against them because NECA did not seek disconnection of access services against Allnet, another carrier that refused to pay the USF and LA charges. ICTC argues, as such, NECA is estopped from enforcing self help provisions, such as disconnection, against ICTC. We find that this argument is without merit because ICTC has not presented any evidence that NECA or its member LECs have actually pursued disconnection against ICTC. The petitioners' request for reconsideration of this issue is, therefore, denied.

7. Finally, petitioners again argue that: (1) the use of NECA as an agent is a fundamental change to the regulatory scheme enacted by Congress; (2) the LECs are barred as a matter of law from invoking self-help provisions because the reasonableness of the underlying USF and LA rates are being challenged; (3) it would be inconsistent to force petitioners to pay the tariffed charges that were calculated using the old mechanism because the Commission has now replaced the old USF mechanism with a new USF mechanism; and (4) the Commission has violated petitioners' equal protection rights because the USF charges are discriminatory, *i.e.*, they purportedly impose a disproportionate impact on small carriers. We addressed these issues in the *ICTC Order*.¹¹ Because petitioners have not

that connecting carriers are exempt from liabilities for damages under the Act).

¹⁰ Communique filed its petition with the Commission in April 1993 and ICTC filed its petition in May 1995. NECA filed its court cases against Communique and ICTC in November 1995 and January 1996, respectively. See *National Exchange Carrier Association, Inc. v. Communique Telecommunications, Inc., d/b/a/ LogiCall* (D.N.J. No. 95-5742) (administratively terminating the matter and referring the issue of whether NECA may assess, bill, and collect USF and LA charges to the Commission).

¹¹ Joint Reply at 8. But see *ICTC Order*, 14 FCC Rcd at 13648 (finding that the use of an agent by member LECs to file tariffs does not constitute a fundamental change to the regulatory scheme enacted by Congress); *ICTC Order* at 14 FCC Rcd at 13650-51 (finding that *Reiter v. Cooper*, 407 U.S. 258, does not render unenforceable as a matter of law the self-help provisions enumerated in the NECA tariff); *ICTC*

presented any new facts, arguments, or changed circumstances with respect to these issues, we see no need to revisit our previous conclusions.

III. CONCLUSION AND ORDERING CLAUSES

8. For the reasons stated above, we affirm our prior Memorandum Opinion and Order denying the petition for declaratory ruling filed by InterContinental Telephone Corporation and dismissing the application for review filed Communique Telecommunications, Inc.

9. ACCORDINGLY, IT IS ORDERED, pursuant to section 1.106 of the Commission's rules, that the Petition for Reconsideration filed by InterContinental Telephone Corporation and Communique Telecommunications, Inc., d/b/a LogiCall IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

Order, 14 FCC Rcd at 13652-53 (finding that the Commission's replacement of the old USF mechanism with a new USF mechanism does not excuse petitioners liability to pay the tariffed charges that were calculated using the old mechanism); *ICTC Order*, 14 FCC Rcd at 13652-53 (finding that ICTC's claim that USF funding mechanism disproportionately affects smaller IXCs subject to USF charges does not colorably establish that its equal protection rights were violated.)